

Before the  
**FEDERAL ECOMMUNICATIONS COMMISSION**  
Washington, D.C. 20554

In the Matter of	)	
	)	
Assessment and Collection	)	MD Docket No. 05-59
of Regulatory Fees for	)	
Fiscal Year 2005	)	

**To: The Commission**

**COMMENTS**

The law firm of Blooston, Mordkofsky, Dickens, Duffy & Prendergast (BMDDP), on behalf of its clients holding FCC radio licenses in the Local Multipoint Distribution Service (LMDS), hereby submits, pursuant to Section 1.415 of the Commission's Rules, the following comments in the above-captioned proceeding. In particular, BMDDP urges the Commission to modify its proposal to calculate the LMDS regulatory fee on a per MHz basis. If adopted, the net result for LMDS licensees would be an increase in their annual regulatory fee from \$270.00 to \$505.00 per call sign, an 87 percent increase for Block A LMDS licensees over Fiscal Year 2004. See Assessment and Collection of Regulatory Fees for Fiscal Year 2000, 19 FCC Rcd. 11662 (2004). It is respectfully submitted that such a substantial increase (or indeed any increase) is not appropriate for LMDS licenses at this time, since LMDS equipment has been slow to develop, and most systems are not yet constructed. Moreover, the level of regulatory activity in the LMDS

is low, and therefore the burden on the Commission created by LMDS is light at this time.

Because LMDS is a nascent service, due to the lack of a cost-effective equipment, BMDDP urges the Commission to reclassify LMDS into the Microwave Category or, at a minimum, maintain the regulatory fee at the current annual rate of \$270.00 per call sign.

#### **I. A FEE INCREASE FOR LMDS IS NOT APPROPRIATE AT THIS TIME.**

The vast majority of BMDDP's LMDS clients are small to medium sized rural carriers which meet the definition of "small business" or "very small business" under the Commission's classifications and those of the Small Business Administration.<sup>1</sup> BMDDP notes that many of the auction winners holding LMDS licenses are rural telephone companies. Most of these entities were awarded Block A LMDS licenses in the FCC's LMDS auction (Auction Event No. 17) which closed on March 25, 1998. Due in part to the limited propagation characteristics of the LMDS spectrum and the amount of transmitters that would be required for rural coverage, equipment manufacturers have not yet been able to develop cost-effective LMDS equipment. As a result, while Block A

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<sup>1</sup> The Regulatory Flexibility Act (5 U.S.C. 601 et. seq.), and the Small Business Administration define a "small business" in the telecommunications industry as one that has fewer than 1,500 employees and is not "dominant" in its field of operations. The Commission's LMDS auction rules, 47 C.F.R. §101.1112, define an "entrepreneur" as having attributable average gross revenues of more than \$40 million but less than \$75 million for the previous three years; "small business" as one having attributable average gross revenues of more than \$15 million but less than \$40 million or less for the preceding three years and a "very small business" as one having attributable average gross revenues of \$15 million or less for the previous three years.

LMDS licensees have made substantial investment for their spectrum, ranging from approximately \$100,000 into the millions of dollars, they have not yet been able to turn their investments into revenue producing telecommunications services, especially in rural areas. And in some cases, rural telephone companies that had actually installed LMDS equipment had to dismantle their systems because of inadequate performance or other problems.<sup>2</sup> See, e.g., Wireless Telecommunications Bureau Seeks Comment on Request by Central Texas Communications, Inc. for Waiver to Allow Temporary Discontinuance of Local Multipoint Distribution Service, Public Notice dated March 26, 2003 (DA 03-865).

As a result, the Commission should take steps to minimize the financial burden on LMDS licensees rather than increase it. Once there is wide-scale deployment and operation of LMDS systems, it may be appropriate to revisit this matter. It is likely that the advent of Wi-Max and other technologies that are currently in the pipeline will eventually spur the development of affordable LMDS equipment. However, now is not the time to increase the costs of being an LMDS licensee, especially in rural areas. The Commission has long recognized the importance of gradualism in protecting fledgling telecommunications industries against new regulatory charges. See Access Charge Reconsideration, 97 FCC 2d 682, 728 (1983); Access Charge Second Reconsideration

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<sup>2</sup> In particular, Central Texas Communications, Inc. (CTC) stated in its request for waiver of Rule Section 101.305(b) that discontinuance of its LMDS service was necessary since there was no technically reliable, economically viable equipment available that could facilitate LMDS service. CTC indicated that it would resume service once more affordable and reliable equipment was developed and manufactured.

Order, 97 FCC 2d 834, 861 (1984); Third Reconsideration Order, 101 FCC 2d 1259, 1299 (1985)(Protecting interexchange carriers by providing Feature Group A and B discounts in order to foster development of interexchange competition). See also Amendments of Part 69 of the Commission's Rules Relating to Enhanced Service Providers, Order, 3 FCC Rcd 2631 (1988)(creating the enhanced service provider ("ESP") exemption).

## **II. THE COMMISSION SHOULD RECLASSIFY LMDS AS MICROWAVE FOR FEE PURPOSES.**

Because the LMDS is located in the upper microwave bands and is functionally equivalent to the with the 24 GHz and 39 GHz services, LMDS should be reclassified into the Microwave Category for purposes of regulatory fee assessment (to match the classification given to the 24 GHz and 39 GHz services) rather than following its proposed course of assessing regulatory fees on a per MHz basis at \$0.44 per MHz.<sup>3</sup> This is because (a) the LMDS is regulated in a manner similar to microwave, i.e., under Part 101 of the Commission's Rules, and (b) the LMDS operates in the 28 GHz and 31 GHz bands, and is functionally and spectrally similar to the other "upper band" microwave services, (i.e., 24 GHz and 39 GHz). In particular, since each of these services is regulated under Part 101 with essentially the same service rules, the principle of

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<sup>3</sup> Under this methodology, Block A licenses, which cover 1,150 MHz of bandwidth, would be assessed a regulatory fee of \$505.00 while Block B licenses, which cover 150 MHz of bandwidth, would be assessed a regulatory fee of \$65.00.

regulatory parity dictates a similar fee structure. Further, each of these services has similar propagation limitations, and each of these services either compete or could compete for the same subscriber base within the same geographic market area.

By reclassifying LMDS into the Microwave Category, LMDS licensees would submit their regulatory fees in accordance with the procedures for collection of small fees. This means that regulatory fees would be collected with applications for new licenses and license renewals, and the regulatory fee would be paid for the entire 10-year license term. The need for licensees to file a separate annual payment form would be eliminated. This simplified procedure would reduce the regulatory burdens on both the Commission and the LMDS licensees, many of whom are small businesses and rural telephone companies. Therefore, the reclassification of LMDS for fee purposes would be consistent with the goals of the Regulatory Flexibility Act, 5 USC §603 and Section 309(j) of the Communications Act of 1934, as amended.

Because of the potential for license partitioning/disaggregation, which could result in the issuance of new call signs, it would be appropriate for the Commission to collect a regulatory fee from the assignee for the balance of the license term as a precondition to a grant of an application requesting Commission consent to a partition and/or disaggregation of an existing LMDS license.

## **CONCLUSION**

In light of the foregoing, it is respectfully submitted that the most appropriate treatment of LMDS for purposes of regulatory fees is to reclassify LMDS into the

Microwave Category. If the Commission declines to treat LMDS as microwave, it should retain the current fee level for LMDS.

Respectfully submitted,

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